

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

- - - - -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

July 16, 2015

10:03 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

(CC: Doc# 8676) Hearing RE: Objection of the ResCap Borrower
Claims Trust to Claim Number 452 Filed By Julio Pichardo

Status Conference RE: Objection of the ResCap Borrower Claims
Trust to Proofs of Claim Filed by Pamela D. Longoni and Jean
Gagnon (Claim Nos. 2291, 2294, 2295 and 2357). [Docket No.
8530]

Status Conference RE: ResCap Liquidating Trust and the ResCap
Borrower Claims Trust's Objection to Claim Nos. 112, 114, 416,
and 417 Filed by Erlinda Abibas Aniel, Fermin Solis Aniel, and
Marc Jason Aniel [Docket No. 8237]

Transcribed by: Penina Wolicki
eScribers, LLC
700 West 192nd Street, Suite #607
New York, NY 10040
(973)406-2250
operations@escribers.net

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

MORRISON & FOERSTER LLP

Attorneys for ResCap Borrowers Claim Trust
250 West 55th Street
New York, NY 10019

BY: JORDAN A. WISHNEW, ESQ.
ERICA J. RICHARDS, ESQ.
JESSICA J. ARETT, ESQ.

ERICKSON, THORPE & SWAINSTON, LTD.

Attorneys for Claimant Gagnon, et al.
99 West Arroyo Street
Reno, NV 89509

BY: THOMAS P. BEKO, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SEVERSON & WERSON, APC
Attorneys for Residential Capital, LLC
19100 Von Karman Avenue
Suite 700
Irvine, CA 92612

BY: YARON SHAHAM, ESQ. (TELEPHONICALLY)

BRADLEY ARANT BOULT CUMMINGS LLP
Attorneys for ResCap Borrower Claims Trust
100 North Tryon Street
Suite 2690
Charlotte, NC 28202

BY: AVERY SIMMONS, ESQ. (TELEPHONICALLY)

ERLINDA ARIEL
Pro Se (TELEPHONICALLY)

JULIO PICHARDO
Pro Se (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ALSO PRESENT: (TELEPHONICALLY)

KATHY PRIORE, ESQ., ResCap Liquidating Trust

RESIDENTIAL CAPITAL, LLC, ET AL.

6

1 P R O C E E D I N G S

2 THE COURT: Please be seated. All right, we're here
3 on Residential Capital, number 12-12020. Good morning.

4 MS. RICHARDS: Good morning, Your Honor. Erica
5 Richards, Morrison & Foerster, appearing today on behalf of the
6 ResCap Borrower Claims Trust. Your Honor, the first matter
7 going forward today is found on page 8 of the agenda, and that
8 is the objection of the Borrower Claims Trust to claim number
9 452 filed by Julio Pichardo, which is filed at docket number
10 8676.

11 THE COURT: Okay. Before we do that, is anyone
12 appearing with respect to the case management conference in
13 Longoni?

14 MR. WISHNEW: Your Honor, there are two individuals on
15 the phone, Ms. Simmons from the Bradley Arant firm on behalf of
16 the Borrower Claims Trust, and Mr. Beko on behalf of the
17 claimants.

18 THE COURT: All right, Mr. Wishnew. I reviewed the
19 proposed case management and scheduling order, and it's in a
20 form and content satisfactory to me. So does anybody else want
21 to be heard with respect to that?

22 MR. WISHNEW: I'll defer to --

23 THE COURT: We'll go ahead and enter that order.

24 MR. WISHNEW: Okay. I'll defer to counsel on the
25 phone.

RESIDENTIAL CAPITAL, LLC, ET AL.

7

1 THE COURT: Anybody want to be heard on the phone
2 about it?

3 MR. BEKO: Your Honor, this is Tom Beko. I do not
4 need to be heard.

5 THE COURT: Okay, thank you.

6 MS. SIMMONS: No, Your Honor.

7 THE COURT: All right. So that's all we had to deal
8 with today on Longoni, right?

9 MR. WISHNEW: Correct, Your Honor.

10 THE COURT: Okay. So that order will get entered
11 today, and certainly anybody on the phone for that conference
12 certainly can disconnect.

13 MR. WISHNEW: Okay.

14 THE COURT: Okay? All right. I'm sorry, go ahead,
15 Ms. Richards.

16 MR. BEKO: Thank you, Your Honor. And thank you again
17 for allowing me to appear by phone.

18 THE COURT: Absolutely. Sure.

19 Okay, go ahead.

20 MS. RICHARDS: Sure, Your Honor. So taking up, again,
21 the objection to Mr. Pichardo's claim.

22 THE COURT: Okay. Mr. Pichardo, you're on the phone.
23 Is that correct?

24 MR. PICHARDO: I'm on the phone, Your Honor. Good
25 morning. And let me know when I should proceed, Your Honor,

1 presenting my claim.

2 THE COURT: Okay. I'll do that.

3 Go ahead, Ms. Richards.

4 MS. RICHARDS: Your Honor, in support of the
5 objection, the Borrower Trust submitted declarations. One was
6 by Kathy Priore, who's the in-house associate counsel for the
7 ResCap Liquidating Trust. We also submitted a declaration by
8 Yaron Shaham, of Severson & Werson, who represents Ocwen in Mr.
9 Pichardo's state court litigation. Both of those individuals
10 are also appearing telephonically today.

11 THE COURT: Okay, go ahead.

12 MS. RICHARDS: Mr. Pichardo filed a timely response to
13 the objection which was docketed at 8745. He also filed a
14 supplemental response after the objection deadline which was
15 docketed at 8878, and a proof of service that included a
16 request for relief from the stay which was docketed at 8798.
17 The Borrower Trust filed a reply addressing all three of those
18 submissions, which was filed at docket number 8876.

19 The objection concerns proof of claim number 452,
20 which was filed by Mr. Pichardo against GMAC Mortgage in the
21 amount of 650,000 dollars. The Borrower Trust has objected to
22 the claim on the basis that it fails to state any cognizable
23 claims against GMAC Mortgage.

24 Before I turn to the merits of those claims, I'll
25 first briefly summarize the relevant factual background.

1 THE COURT: I've read everything. So you don't need
2 to summarize the factual background.

3 MS. RICHARDS: Okay. Would Your Honor like me to just
4 proceed to our position on the merits of the claims?

5 THE COURT: Yes, please.

6 MS. RICHARDS: All right. So the first point that I
7 would make is that Mr. Pichardo never amended his initial proof
8 of claim and he never submitted the first amended complaint in
9 support of his proof of claim. So it's our position that that
10 first amended complaint is not actually part of his proof of
11 claim.

12 Out of an abundance of caution we addressed all of the
13 causes of action set forth in both his initial complaint and
14 the first amended complaint in the objection.

15 THE COURT: When did Mr. Pichardo file his action in
16 the Orange County Superior Court?

17 MS. RICHARDS: In July 2012, a month-and-a-half after
18 ResCap Filed for bankruptcy.

19 THE COURT: Okay, go ahead.

20 MS. RICHARDS: So the first cause of action raised in
21 Mr. Pichardo's initial complaint is a claim for violation of
22 the Fair Debt Collection Practices Act. As set forth in the
23 objection, GMAC Mortgage began servicing Mr. Pichardo's loan
24 shortly after its inception. Mr. Pichardo was current on the
25 loan at that time. And as a result, under the FDCPA, GMAC

1 Mortgage is not the debt collector as defined under the
2 statute, and it's inapplicable here.

3 Mr. Pichardo's second cause of action raised in his
4 initial complaint is one for negligent misrepresentation. That
5 claim is based on his allegation that statements were made by
6 agents and employees of GMAC Mortgage that his loan was in
7 default. As Your Honor knows, the elements of a claim for
8 negligent misrepresentation require that a defendant made a
9 misrepresentation of a past or existing fact -- material fact
10 without reasonable grounds for believing it to be true, and
11 among other elements, damages.

12 Mr. Pichardo has not credibly alleged with any
13 specificity that GMAC Mortgage advised Mr. Pichardo of any
14 information that was false, nor has he pled reliance on any
15 statements by GMAC Mortgage regarding the status of his loan,
16 nor has he shown damages as a result of conduct by GMAC
17 Mortgage.

18 His primary claim for damages arises out of
19 allegations that he suffered personal injury, resulting from a
20 decline in his health due to stress caused by statements made
21 by GMAC employees. However, the records he attached to the
22 proof of claim show that as of April 2009, he was already on
23 permanent disability; he said that he had a litany of health
24 problems.

25 THE COURT: Well, but he -- the fact that someone may

1 have had a current medical condition doesn't preclude somebody
2 from asserting that improper conduct exacerbated his condition.
3 Do you agree with that?

4 MS. RICHARDS: I agree with that, Your Honor.

5 THE COURT: I mean, it's the eggshell head case. You
6 take the plaintiff as you find them, and if you find them with
7 suffering from some medical or emotional condition, and the
8 alleged conduct, assuming that the conduct would be actionable,
9 exacerbates the condition, couldn't that give rise to a claim
10 including damages for emotional distress?

11 MS. RICHARDS: I think that it could, Your Honor. But
12 here, we also -- I think that would be a disputed matter of
13 fact that might be --

14 THE COURT: You agree?

15 MS. RICHARDS: -- appropriate for further hearing.
16 But we also think Mr. Pichardo has not plausibly alleged the
17 other elements of negligent misrepresentation.

18 THE COURT: Here's what I have some difficulty with.
19 You attach to the papers in support of the objection the
20 payment history.

21 MS. RICHARDS: Yes.

22 THE COURT: And I've got to tell you, it's not easy to
23 decipher or understand, and there's no declaration explaining
24 it. Let me focus -- because this is the concern I have. The
25 facts that give rise to some concern on my part, and then if

1 those facts give rise to causes of action -- it may be more
2 than one cause of action, but it's the same basic facts that
3 cause me some concern.

4 And it relates to the breach -- the facts leading up
5 to the breach letter which is dated August 3, 2009, which
6 stated that Mr. Pichardo and his wife were in default of their
7 loan because he failed to make payments for June, July, and
8 August 2009. The payment history, if I'm reading it correctly,
9 indicates Mr. Pichardo was current through April 2009, but
10 thereafter failed to make full monthly payments for May, June,
11 and July 2009.

12 Mr. Pichardo attaches return receipts showing that he
13 sent packages to GMAC on June 19th and July 9th, 2009. And
14 there's a payment entry on the payment history on June 24th,
15 2009, with a payment amount of 832 dollars. At that time, the
16 records would appear that a full payment had to be \$1,584.50.

17 There's no payment entry for July 2009. Mr.
18 Pichardo -- and I'm going to have questions for him -- alleges
19 that he made payments.

20 MR. PICHARDO: Yes.

21 THE COURT: And so that's what's -- I guess I have a
22 question. Let me -- Mr. Pichardo, let me ask you now. I'll
23 take you a little bit out of order. I'll give you a chance to
24 make your full argument when we're done.

25 MR. PICHARDO: Yes.

1 THE COURT: Do you agree that the amount of the
2 payment you made in June 2009 was \$832 rather than \$1,584.50?

3 MR. PICHARDO: Yes, Your Honor. That was the amount
4 that the loss mitigation requested that I send, and it was two
5 checks of 832, as you can see in my evidence, that I sent,
6 docketed number 8878. There is two checks for that same
7 amount. And the payments were up-to-date, Your Honor. There
8 was no missing payments. And my main concern is that they
9 defaulted and foreclosed this loan due to the fact -- and I
10 have submitted those checks that shows two payments during that
11 time, requested by loss mitigation. And those checks are proof
12 that it was up-to-date. And that's what they requested.

13 As you can see, the proof of service to them shows
14 that it was directly to loss mitigation. And that's the --
15 because they had initiated modification process by them.

16 THE COURT: So when did you -- did you send the two
17 checks together or --

18 MR. PICHARDO: Yes, Your Honor.

19 THE COURT: -- one each month? When did you --

20 MR. PICHARDO: As you can see on docket number 8878.

21 THE COURT: Yes.

22 MR. PICHARDO: They're together.

23 THE COURT: Okay. And when did you send them?

24 MR. PICHARDO: That's -- those were sent June 19th.

25 THE COURT: Okay. And what did you send on July 9th?

1 MR. PICHARDO: On July 9th, I sent them the other
2 payment which was requested for August, because apparently they
3 were saying that they needed to send me the statements for
4 this -- for this loan would be principal reduction, rate
5 reduction, and the liens on the property included. And I said,
6 okay, here goes. And I sent it, forward it, and that current
7 receipt shows that they received it.

8 THE COURT: I know. How much did you send for the
9 August payment?

10 MR. PICHARDO: The same amount.

11 THE COURT: 832.

12 MR. PICHARDO: Be -- yes. Because this is what they
13 designated for June, July, and August.

14 THE COURT: All right. Thank you.

15 MR. PICHARDO: And then when the --

16 THE COURT: Mr. Pichardo, I'll --

17 MR. PICHARDO: I'm sorry.

18 THE COURT: I'll come back and ask you -- that answers
19 my immediate questions. But I'll give you a chance to make
20 your full argument, okay?

21 MR. PICHARDO: Sure.

22 THE COURT: All right. So, Ms. Richards, so do you
23 agree that Mr. Pichardo made payments -- three payments in the
24 amount of 832 each, two of them sent on June 19th and one on
25 July 9th?

RESIDENTIAL CAPITAL, LLC, ET AL.

15

1 MS. RICHARDS: I do, Your Honor. I think I can
2 clarify the --

3 THE COURT: No, no, I just want to make sure I --
4 there's no dispute about that?

5 MS. RICHARDS: He did make those payments.

6 THE COURT: Okay.

7 MS. RICHARDS: Absolutely, Your Honor.

8 THE COURT: And how were those payments -- so the
9 payment history shows a 832-dollar payment recorded on June
10 24th. That partial payment, if I'm understanding the loan
11 history correctly, is that -- how is that reflected in the
12 payment history?

13 MS. RICHARDS: So looking on page 4 of the payment
14 history --

15 THE COURT: Yes.

16 MS. RICHARDS: -- it's shown as a payment. So I
17 believe Mr. Pichardo was making those payments under a
18 temporary loan modification agreement.

19 THE COURT: Okay.

20 MS. RICHARDS: So GMAC sent their standard default
21 letters, because it wasn't the full amount. The default was
22 wiped out as soon as the loan modification became permanent.

23 THE COURT: So but there's no -- I didn't see a
24 payment entry in July --

25 MR. PICHARDO: Um-hum.

1 THE COURT: -- that would match up to the -- Mr.
2 Pichardo indicates and he attaches the return receipt for July
3 9th, 2009, and he indicates with that he sent the August
4 payment for 832 payments. And I don't see that payment
5 recorded. I may have -- I'm having a hard time understanding
6 the payment history here. I'm just trying to get to the basic
7 facts. We'll see whether that gives rise to a claim or not,
8 but -- okay?

9 MS. RICHARDS: Understood, Your Honor. I also don't
10 see that payment in the payment history. I'm not an expert at
11 reading these records either.

12 THE COURT: Well, that didn't make life easy for me,
13 okay?

14 MS. RICHARDS: Understood.

15 THE COURT: So but you don't dispute he sent that
16 payment?

17 MS. RICHARDS: He submitted evidence showing he sent
18 the payment.

19 THE COURT: Okay. So why isn't it there? I mean --

20 MR. PICHARDO: Um-hum.

21 THE COURT: -- so he submitted evidence that he sent
22 the payment.

23 MS. RICHARDS: Correct, Your Honor.

24 THE COURT: Did it get deposited at some point, and
25 when, and how was it treated in the payment history?

1 MS. RICHARDS: I can't speak to that at this moment,
2 Your Honor.

3 THE COURT: That's what I'm concerned about.

4 MS. RICHARDS: What I would say is that Mr. Pichardo
5 was granted a loan modification on very favorable terms.
6 There's no record of --

7 THE COURT: We'll get -- we'll get --

8 MS. RICHARDS: -- default after --

9 THE COURT: -- we'll get to that --

10 MS. RICHARDS: -- the modification.

11 THE COURT: -- okay? All right. So when he was sent
12 the notice of default, there was a temporary modification in
13 place is your position, right?

14 MS. RICHARDS: I believe that was the case, Your
15 Honor, yes.

16 THE COURT: Okay. And that doesn't -- shouldn't that
17 be reflected in the notice that's sent? Because the notice of
18 default is that he hadn't paid May, June, or July?

19 MS. RICHARDS: Your Honor, I am -- I was trying to
20 find it in the servicing notes, and I can't on the fly. Mr.
21 Pichardo contacted the debtors when he received those
22 notices --

23 THE COURT: Yes.

24 MS. RICHARDS: -- and said I'm making payments under
25 the temporary loan modification, why did I get this notice.

1 And they informed him that it's an auto-generated letter; it
2 goes out. He should disregard them; continue making payments
3 under the temporary modification, and when his modification was
4 final it wouldn't count against him. And that is exactly what
5 happened.

6 THE COURT: All right. Mr. Pichardo, did --

7 MR. PICHARDO: There was no notification saying, Your
8 Honor, canceling letter, like a problem -- or have a problem
9 sending notification. The only notification I got, as you can
10 see --

11 THE COURT: Wait, Mr. Pichardo, stop, stop, stop.

12 MR. PICHARDO: Yes.

13 THE COURT: What Ms. Richards has said is that you
14 contacted GMAC. Did you have a telephone conversation with a
15 representative of GMAC raising the issue about why you got the
16 notice of default, and do you agree that they told you what Ms.
17 Richard said, that --

18 MR. PICHARDO: No, no, Your Honor. They did not tell
19 me that. They asserted that they received the payment
20 according to their instruction of the three payment of 832
21 dollars, and during that time, that's when I received this
22 notice of default and foreclosure proceeding.

23 THE COURT: Okay, but I --

24 MR. PICHARDO: Which I called them about.

25 THE COURT: -- I want to be clear. Because Ms.

1 Richards says that the loan notes reflect that you had a
2 conversation with someone from GMAC. You called them to
3 inquire why you got the notice of default when you had made
4 payments pursuant to the temporary modification agreement. And
5 Ms. Richards says you were told that once the modification is
6 finalized that would be reversed; that's the standard done.
7 And I just wanted to know --

8 MR. PICHARDO: No, that's -- that's incorrect, Your
9 Honor.

10 THE COURT: Okay. All right. So Ms. --

11 MR. PICHARDO: The only assertion they gave me that
12 they had received the payment sent as required by them.

13 THE COURT: Okay. All right. So Ms. Richards, isn't
14 that a disputed issue of fact?

15 MR. PICHARDO: May I, Your Honor?

16 THE COURT: No, hang -- just bear with me, okay?

17 MR. PICHARDO: Okay. Okay.

18 (Pause)

19 THE COURT: The silence is because I'm looking at some
20 documents, Mr. Pichardo, so that's the pause.

21 MR. PICHARDO: Yes.

22 (Pause)

23 THE COURT: Okay, go ahead, Ms. Richards.

24 One of my law clerks has pointed out to me page --
25 this is Exhibit E to the Priore declaration, on page 45 at the

1 bottom of the page, there's an entry for an August 7, 2009 call
2 from the borrower. Is that what you were referring to?

3 MS. RICHARDS: It is, Your Honor. That's where I was
4 going to direct your attention.

5 THE COURT: Okay, go ahead.

6 MS. RICHARDS: So, Your Honor --

7 THE COURT: So isn't there a disputed issue of fact
8 between -- Mr. Pichardo wasn't told disregard the notice or if
9 a modification is finalized. I see what's in your document.

10 MS. RICHARDS: We have documentary evidence
11 contradicting his allegations.

12 THE COURT: That's what's called a disputed issue of
13 fact.

14 MS. RICHARDS: Understood, Your Honor.

15 What I would also say, though, is that his pleadings
16 are not specific about when he alleged GMAC was making the
17 threats about foreclosure. It's unclear if it refers to the
18 time prior to modification.

19 THE COURT: Oh, come on. They sent him an August --
20 on August 3rd, they sent him a notice of default. I mean --

21 MS. RICHARDS: And then they granted him a loan
22 modification.

23 THE COURT: Well, we'll deal with what that -- the
24 effect of that. But you don't -- there's no dispute that GMAC
25 sent him a notice of default.

1 MS. RICHARDS: Agreed, Your Honor. They sent him a
2 notice of default. They never sent him a notice of
3 foreclosure.

4 THE COURT: Okay.

5 MS. RICHARDS: They never instituted foreclosure
6 proceedings against him.

7 THE COURT: Okay.

8 MS. RICHARDS: So his allegations in that respect are
9 incorrect.

10 THE COURT: Well, he -- I'm not -- by my comment, I'm
11 not suggesting it was improper to send him the notice of
12 default. But sending somebody a notice of default if they
13 shouldn't be getting one certainly can have adverse
14 consequences, correct, to a borrower?

15 MS. RICHARDS: It could, Your Honor. I would say,
16 again, I'm not an expert on how GMAC handled its accounts that
17 were in the process --

18 THE COURT: Okay.

19 MS. RICHARDS: -- of a temporary modification. I
20 don't know that it's fair to say that they incorrectly sent him
21 the notice of default.

22 THE COURT: Okay. It still leaves the question in my
23 mind of what happened to the 832-dollar payment that he sent on
24 July 9th that doesn't get reflected in the payment history.
25 You acknowledge that he's provided evidence that he sent the

1 payment.

2 MS. RICHARDS: He submitted evidence that he provided
3 the payment, yes.

4 THE COURT: And it's indisputable that the payment's
5 not recorded in the payment history, correct?

6 MS. RICHARDS: I don't see it in the payment history.

7 THE COURT: Okay, I don't either. But so for present
8 purposes, there seems to be a dispute about that payment,
9 although -- we'll move on from there.

10 MS. RICHARDS: Turning back to the causes of action --

11 THE COURT: Yes.

12 MS. RICHARDS: -- in the initial complaint. Your
13 Honor, the next cause of action that Mr. Pichardo asserted in
14 the initial complaint was that GMAC violated California's
15 Unfair Competition Law.

16 THE COURT: Okay. So let's assume I agree with you
17 that injunctive relief isn't available. So address the
18 restitution issue.

19 MS. RICHARDS: So in the initial complaint, Mr.
20 Pichardo made no allegations that he had made any specific
21 payments to GMAC that they kept --

22 THE COURT: Look, I'm not ruling on it at this point,
23 but you've known about that first amended complaint for a very
24 long time.

25 MS. RICHARDS: We have, Your Honor.

1 THE COURT: Okay.

2 MS. RICHARDS: Which is why we addressed it.

3 THE COURT: And with a pro se -- I read he had a
4 lawyer in California, right?

5 MS. RICHARDS: He's had --

6 THE COURT: Two.

7 MS. RICHARDS: He's gone through two counsel, yes,
8 Your Honor.

9 THE COURT: Okay. But he filed this claim, pro se, by
10 himself, without a lawyer.

11 MS. RICHARDS: He did.

12 THE COURT: And I'm going to -- I'm taking this under
13 submission when we get to the end of the day, but you won't be
14 shocked if I decide that I need to consider the first amended
15 complaint as permitted, in essence, to amend his claim, to
16 assert those matters asserted in the first amended complaint.

17 So let's deal with it as if I had ruled, okay?

18 MS. RICHARDS: Understood, Your Honor. I will do
19 that.

20 So under the first amended complaint, Mr. Pichardo
21 alleged that he made irregular payments on account of
22 undisclosed fees and costs; not that he made payments that were
23 never credited to his account; not that GMAC pocketed funds.
24 He says that he made irregular payments. And if you look at
25 the payment history, it does show that he made payments for

1 amounts after the modification that didn't quite track with his
2 required payment.

3 GMAC applied those amounts to reduce his principal
4 balance as a curtailment. So there's no allegation and no
5 evidence that GMAC Mortgage retained any payments made by Mr.
6 Pichardo --

7 THE COURT: Okay.

8 MS. RICHARDS: -- for the loan --

9 THE COURT: Your position is, anything he paid got
10 credited?

11 MS. RICHARDS: Exactly, Your Honor.

12 THE COURT: Okay. So just to deal with the first --
13 the original complaint has this false advertising --

14 MS. RICHARDS: It did, Your Honor.

15 THE COURT: -- claim. And your position -- and your
16 position with respect to that is what?

17 MS. RICHARDS: Is that it's inapplicable. There's no
18 allegation that GMAC Mortgage was soliciting services from Mr.
19 Pichardo through any advertising.

20 THE COURT: Right. This was -- this dispute focuses
21 on communications between Mr. Pichardo and GMAC and not
22 communications to the public, right?

23 MS. RICHARDS: Yes, Your Honor.

24 THE COURT: Okay. All right. So let's talk more
25 about the first amended complaint.

1 MS. RICHARDS: Okay. So the first cause of action
2 listed in the first amended complaint is Mr. Pichardo's claim
3 for breach of contract.

4 THE COURT: Right.

5 MS. RICHARDS: And this is based on his allegations
6 that GMAC Mortgage failed to honor the terms of the August
7 modification agreement. I'm sure Your Honor is very familiar
8 with the elements required for breach of contract.

9 THE COURT: I am. Let me -- just to focus the
10 discussion very specifically.

11 MS. RICHARDS: Yes.

12 THE COURT: You argue that there was no contract,
13 because material terms were missing.

14 MS. RICHARDS: That's correct, Your Honor.

15 THE COURT: Okay. That contract, on the face of it,
16 doesn't it specifically deal with all principal and interest
17 payments that Mr. Pichardo was required to make? I mean, if
18 you look at the four corners of that August agreement, there
19 doesn't appear to be any principal unaccounted for. You may
20 not like it; it may have been stupid for GMAC -- somebody at
21 GMAC to prepare and sign it, but it recites that it amends and
22 supplements the note. The note was in the original principal
23 amount of 190,000 dollars. And the contract sets forth that as
24 of the effective date, "the amount payable under the note is
25 \$63,272.87." And then "consisting of the amounts loaned to,"

1 Mr. Pichardo, "and any accrued but unpaid interest capitalized
2 to date." And it also provides for the calculation of interest
3 in the amount of Mr. Pichardo's monthly payments of principal
4 and interest.

5 So I don't see -- reading the four corners of that
6 document, which also has an integration clause, saying that:
7 "This agreement and the note and security interest as amended
8 hereby sets forth the entire understanding between the parties,
9 there are no unwritten agreements between the parties," the
10 issue that I'm concerned about is whether -- under ordinary
11 rules, you can't use parol evidence to vary the terms of a
12 writing that appears to be complete on its face. Address that.

13 MS. RICHARDS: Your Honor, the modification agreement
14 clearly states that it amends and supplements the note. The
15 note was for an amount much larger than 60,000 or 63,000
16 dollars. The fact that the agreement is completely silent
17 about the 120,000 dollars --

18 THE COURT: Well, it's --

19 MS. RICHARDS: -- it doesn't say --

20 THE COURT: -- not completely silent. It says --

21 MS. RICHARDS: -- it's reduced --

22 THE COURT: -- the amount payable under this note
23 is -- it amends the note and it says the amount payable under
24 the note is \$63,272.87. What's ambiguous or unclear about
25 that?

1 MS. RICHARDS: Nothing is ambiguous.

2 THE COURT: Okay.

3 MS. RICHARDS: It is omitting a material fact.

4 THE COURT: How is it omitting. A note has a
5 principal amount. The August contract states that it amends
6 the note, and that the amount payable under the note at --
7 amount payable under the note from the August agreement, and it
8 has the \$63,272.87. And this is consisting of amounts loaned
9 and any accrued and unpaid interest.

10 It may have been a careless error on the part of the
11 scrivener at GMAC. But the four corners of that agreement with
12 an integration clause, why isn't that an enforceable contract,
13 fully integrated, on which you cannot rely on parol evidence to
14 vary the terms?

15 MS. RICHARDS: Your Honor, if you apply those same
16 arguments to the amended agreement, this agreement, even if it
17 was valid, was superseded by an agreement which Mr. Pichardo --

18 THE COURT: We'll get to that. We'll get to that.
19 Okay? There is no question. And Mr. Pichardo alleges --
20 whether it's sufficient to state a cause of action or not --
21 that he was -- he signed it under duress, whatever.

22 So it seems to me I've got a couple of questions I've
23 got to deal with. First, was the original contract an
24 enforceable contract? You argue it's not. The other side of
25 it is -- and I'm not deciding it yet -- the other side of that

1 argument is that there's nothing uncertain or ambiguous. It
2 says how much -- it amends the note, says how much is payable.

3 Look, principal reductions were not common, but
4 they're not unheard of. When there's a principal reduction,
5 it'll say what the amount that has to be paid. That's what Mr.
6 Pichardo argues is the case here, that there's nothing
7 uncertain -- and there's law about when you can vary the
8 terms -- when you're permitted to go to parol -- use parol
9 evidence.

10 MS. RICHARDS: Your Honor, I would --

11 THE COURT: Tell me why you think it's not an
12 enforceable agreement?

13 MS. RICHARDS: As an initial matter, and the servicing
14 records that we attach to the objection show this, when Mr.
15 Pichardo first contacted GMAC and he said I would like a loan
16 modification, he asked for principal reduction, and they told
17 him that was unavailable. It's scattered throughout the
18 servicing notes.

19 THE COURT: So you're arguing it was a unilateral
20 mistake on the part of GMAC to enter into a written contract
21 with Mr. Pichardo that on the face of it appears to reduce the
22 principal amount of his obligation to 63,000 dollars?

23 MS. RICHARDS: Correct, Your Honor. GMAC --

24 THE COURT: And why is it that you think a unilateral
25 mistake will vitiate this contract? Have you established all

1 of the requirements to set aside a contract on the grounds of
2 unilateral mistake?

3 MS. RICHARDS: We didn't brief that argument in our
4 papers, Your Honor.

5 THE COURT: I know.

6 MS. RICHARDS: We believe the contract was incomplete,
7 and it did not reflect the meeting of the minds as the parties
8 had agreed to it when the ran the loan modification. GMAC told
9 Mr. Pichardo he would not be getting a principal reduction.

10 THE COURT: Despite the language of this writing --

11 MS. RICHARDS: The writing does not memorialize the
12 oral communications that the parties had had.

13 THE COURT: I see.

14 MS. RICHARDS: And it would be --

15 THE COURT: And therefore --

16 MS. RICHARDS: -- inequitable to allow Mr. Pichardo to
17 capitalize on an error in an agreement.

18 THE COURT: And then therefore the integration clause
19 in all capital letters: "This agreement and the note and
20 security instrument as amended hereby, sets forth the entire
21 understanding between the parties. There are no unwritten
22 agreements between the parties." That's in the contract, in
23 all capital letters. And you think that just has no effect?

24 MS. RICHARDS: I would say it doesn't say the contract
25 that's otherwise incomplete.

1 THE COURT: Okay. Let's go on to the next issue.

2 MS. RICHARDS: So whether or not Your Honor believes
3 that the August agreement was a valid and binding contract, in
4 any event, it was superseded by the subsequently executed,
5 corrected agreement, which contains the same language
6 regarding --

7 THE COURT: Right.

8 MS. RICHARDS: -- complete agreement, amending and
9 superseding completely. As you noted, Mr. Pichardo has alleged
10 that he signed that contract under duress.

11 THE COURT: Right.

12 MS. RICHARDS: Even if that's true, which GMAC
13 disputes, Mr. Pichardo ratified the agreement subsequently
14 through his conduct by continuing to accept performance under
15 the corrected agreement, for years --

16 THE COURT: So let me --

17 MS. RICHARDS: -- until the contract was transferred
18 to Ocwen.

19 THE COURT: -- let's assume that I agree with you that
20 the amended -- the further amended contract is the operative
21 document and that he can't assert a breach of contract claim
22 based on the August -- earlier August agreement. Why wouldn't
23 he have properly stated as to the first agreement a breach of
24 implied covenant of good faith and fair dealing claim, the
25 elements of which in California are parties entered into a

1 contract -- if we assume that contract was valid, they entered
2 into a contract; the plaintiff fulfilled his obligations under
3 the contract, he said I made the payments. Any conditions
4 precedent to the defendant's performance occurred; the
5 defendants unfairly interfered with the plaintiff's rights to
6 receive the benefits of the contract; and the plaintiff was
7 harmed by the defendant's conduct.

8 So since the corrected contract added all that
9 principal back in, his argument that he's harmed by your --
10 let's assume he's satisfied that element; I think the sticking
11 point is, has the defendant unfairly interfered with the
12 plaintiff's right to receive the benefits of the contract.

13 So he basically -- he alleges that through threats and
14 duress, he was basically forced to sign the corrected
15 agreement. Do you agree that's his allegation?

16 MS. RICHARDS: I agree that is his allegation, Your
17 Honor.

18 THE COURT: So why doesn't that state a claim for
19 breach of the implied covenant of good faith and fair dealing
20 with respect to the first contract?

21 MS. RICHARDS: Your Honor, the cause of action
22 requires the existence of an implied duty to --

23 THE COURT: Does it? No. I'm reading from Rosenfeld
24 v. JPMorgan Chase, 732 F.Supp 2d 952, 968 (N.D.Ca. 2010). It
25 specifically -- I'll quote to you from it: "In California, the

1 factual elements necessary to establish a breach of the
2 covenant of good faith and fair dealing are: (1) the parties
3 entered into a contract; (2) the plaintiff fulfilled his
4 obligations under the contract; (3) any conditions precedent to
5 the defendant's performance occurred; (4) the defendant
6 unfairly interfered with the plaintiff's right to receive the
7 benefits of the contract; and (5) the plaintiff was harmed by
8 the defendant's conduct." That's a quote from the case.

9 And another case, Woods v. Google, Inc., 889 F.Supp.
10 2d 1882 (sic), 1194 (N.D.Ca. 2012): "A plaintiff must show
11 that the conduct of the defendant, whether or not it also
12 constitutes a breach of a consensual contract term,
13 demonstrates a failure or refusal to discharge contractual
14 responsibilities."

15 So why hasn't Mr. Pichardo sufficiently pleaded a
16 cause of action for breach of the implied covenant of good
17 faith and fair dealing -- if I find that that first agreement
18 was an enforceable contract, why hasn't he sufficiently alleged
19 breach of the implied covenant of good faith and fair dealing?

20 MS. RICHARDS: Your Honor, it's not a breach of an
21 agreement to request that a party amend that agreement. He
22 cited no case law for that proposition.

23 THE COURT: Well, he certainly -- you know, one
24 question I have is has he fairly alleged that the defendant
25 unfairly interfered with his rights to receive the benefits of

1 the contract.

2 MS. RICHARDS: But --

3 THE COURT: When GMAC insisted that the contract be
4 amended -- further amended, he argues that GMAC unfairly
5 interfered with his right to receive the benefits of that
6 contract. It may have been stupid. It may have been a
7 terrible mistake for GMAC to sign a contract that on its face
8 would appear to include the substantial principal reduction,
9 but they did.

10 MS. RICHARDS: Your Honor, I don't see what is unfair
11 in --

12 THE COURT: You don't?

13 MS. RICHARDS: -- GMAC contacting the plaintiff and
14 saying the agreement contained an error. You know, because we
15 spoke, that you were never getting a principal reduction.

16 THE COURT: So that sounds like a disputed issue of
17 fact about what the conversations were that caused Mr. Pichardo
18 to sign the corrected or amended agreement. Right? You say
19 that GMAC said you know, Mr. Pichardo, that that wasn't our
20 agreement. Disputed issues of fact, agreed?

21 MS. RICHARDS: Agreed, Your Honor.

22 THE COURT: Okay. Let's go on to the negligence
23 claim.

24 MS. RICHARDS: The negligence claim is based on
25 allegations that GMAC failed to accurately calculate and credit

1 payments made by Mr. Pichardo, prepared and filed false
2 documents, and threatened foreclosure without having the legal
3 authority to do so.

4 As Your Honor is well aware, there's a plethora of
5 case law stating that lenders and their agents do not owe a
6 duty of care as a general matter to borrowers. And Mr.
7 Pichardo has not identified any exception that would apply in
8 this case.

9 THE COURT: Well, Lueras v. BAC Home Loan Servicing,
10 163 Cal. Rptr. 3d 804, 820, (CA Ct. App. 2013) would seem to
11 support your argument, were California law all that clear.
12 Segura v. Wells Fargo Bank, the existence of a duty of care
13 owed by financial institutions in the process of considering
14 borrowers for loan modification is an unsettled issue. So
15 Lueras may well be the most persuasive authority, but would you
16 agree that the issue is not entirely resolved in California?

17 MS. RICHARDS: Based on the citation you just read me,
18 California courts believe it's unsettled, it sounds like.

19 THE COURT: Lueras is pretty strong authority, because
20 it says: "Rights duties and obligations," I'll add some words,
21 offering, considering, or approving loan modifications and
22 exploring foreclosure alternatives are "set forth in the note
23 and deed of trust, the parties forbearance agreement, federal
24 and state statutes and regulations and the directives and
25 announcement of the United State Department of Treasury and

1 Fannie Mae."

2 So I mean, I think -- Lueras is strong support for
3 your position. It's not entirely clear under California law,
4 but I -- is there anything you want to add to the argument?

5 MS. RICHARDS: There is not, Your Honor.

6 THE COURT: Okay.

7 MS. RICHARDS: We've believe the weight of authority
8 is in favor of our position.

9 THE COURT: Okay. And let's talk about unjust
10 enrichment. There is no private cause of action -- there is no
11 independent cause of action in California for unjust
12 enrichment. That's your position?

13 MS. RICHARDS: It is, Your Honor.

14 THE COURT: Okay. Among other cases, Melchior v. New
15 Lines Products, Inc., 131 Cal. Rptr. 347, 357 (CA Ct. App.
16 2003).

17 Okay. Let's talk about the Unfair Competition Law,
18 the Business and Professions Code 17200. Mr. Pichardo alleges
19 that he was coerced into executing the corrected agreement
20 under the pretense that GMAC would foreclose on his property at
21 the time when he was not in default. Why isn't that if true --
22 if true, why wouldn't that constitute an unfair or fraudulent
23 business practice within the meaning of Business and
24 Professions Code 17200?

25 MS. RICHARDS: Your Honor, my understanding of that

1 statute is that it relates to competition. So actions taken by
2 a company seeking to gain an advantage over a competitor. I
3 don't see how those allegations would support an unfair
4 competition claim.

5 THE COURT: Could you remind me, have -- I thought I
6 had -- I didn't look at this -- I didn't go back to look at
7 this. I thought in prior ResCap borrower claims, I had
8 addressed the 17200 claim. Can you remind me about that?

9 MS. RICHARDS: Just give me a moment, Your Honor.

10 Your Honor, I apologize, I'm not familiar with your
11 prior decisions on that.

12 THE COURT: I can't keep them -- keep track of them
13 all at this point either, because they're -- I've tried to -- I
14 have probably had to address the law in at least a dozen states
15 with respect to various borrower claims. And so I have some
16 trouble keeping it straight in my own mind.

17 I'm pretty sure -- Mr. Wishnew, have I addressed the
18 17200 claims?

19 MR. WISHNEW: I believe so, Your Honor. I know that
20 in other California borrower cases, borrowers have definitely
21 pled 17200 --

22 THE COURT: Tia Smith and Karen Rozier.

23 MR. WISHNEW: That's exactly right, Your Honor.

24 THE COURT: And what did I do in those?

25 MR. WISHNEW: I believe -- look, Ms. Rozier's claim

1 was expunged in its entirety. Ms. Smith's claim was also
2 expunged, I think substantially in its entirety, with one
3 element remaining.

4 THE COURT: Let me check with my law clerks.

5 My law clerk advises me that with respect to Tia
6 Smith, I overruled the objection with respect to the unfair
7 competition law claim.

8 MR. WISHNEW: I think Ms. --

9 THE COURT: I have to go back and reread the opinion,
10 but --

11 MR. WISHNEW: Right. And I think Ms. Smith has
12 appealed that opinion now.

13 THE COURT: Well, she may have appealed, but you lost
14 on this issue.

15 MR. WISHNEW: That is true, Your Honor. I think that
16 might be the only case we've lost on that particular California
17 Code section.

18 THE COURT: I need to go back and look at it.

19 Ms. Richards, that -- Business and Professions Code
20 17200 existed for a long time. It was -- I haven't practiced
21 law in California since 1985. But from '72 to '85 I used to
22 have a fair number of cases under 17200, and they all -- they
23 were not all competition cases. Okay, so, it's a frequently --
24 plaintiffs frequently attempt to rely on 17200. I'll have to
25 go back and look at it. I was pretty sure I've addressed it

1 before. My clerks tell me I did with respect to Smith and
2 Rozier. I'll have to go back and look at what I did.

3 MS. RICHARDS: Good.

4 THE COURT: Okay. Let me see if I have other
5 questions for you. I don't. Is there anything else you want
6 to tell me now?

7 MS. RICHARDS: Not at this time, Your Honor.

8 THE COURT: Okay. Mr. Pichardo, your turn.

9 MR. PICHARDO: Yes. Your Honor, this claim is based
10 on the default and foreclosure they initiated which immediately
11 caused an effect on me. It sent me to the hospital, Your
12 Honor, because I was update on payments and following every
13 instruction. There had never been any late payments. All
14 payments had been made correctly, according to the servicer.

15 So when I see this, and I called them, and I said you
16 have sent me -- and I need to show this, Your Honor -- I
17 numbered my documents -- number document 11 shows that prior to
18 all of this, they sent the default and foreclosure. Prior to
19 all of this.

20 THE COURT: But when you say -- stop for a second.
21 When you say "prior to all of this", you acknowledge that for
22 June, July, and August 2009, you made payments of 832 dollars
23 for each of those months. I'll go further, but at least that
24 part, you don't dispute, correct?

25 MR. PICHARDO: That was the -- I don't dispute it,

1 because that was the amount indicated by loss mitigation to
2 make.

3 THE COURT: Right.

4 MR. PICHARDO: But if you look, Your Honor --

5 THE COURT: Well, let me -- stop, stop, stop. Let me
6 take it one step at a time.

7 MR. PICHARDO: Okay, I'm sorry.

8 THE COURT: I just want to be sure. As to those
9 payments, that's the amount -- you agree that's the amount you
10 paid, and you made those pursuant to the temporary modification
11 that GMAC agreed upon with you. Correct?

12 MR. PICHARDO: The modification is -- was not a
13 temporary, Your Honor, because it was -- it was negotiated for
14 eight months. So they did not send me any notification saying
15 this is a temporary -- nor did I have a conversation at any
16 time. It was sent to me, signed. I sent it back. They
17 note -- they executed it. There was never any notification.
18 The only notification I got was about the one I mentioned, Your
19 Honor, that prior to this loan modification, they sent me July
20 10th of '09 notification of default and foreclosure. That's
21 prior to all of this. And that's what sent me to the hospital.

22 And I said, but I haven't defaulted. I have every
23 payment. I have followed everything that I was instructed to.
24 And if you see -- if you look, Your Honor, I numerated document
25 number 11, which is dated 7/10 of '09. That's prior to all of

1 this.

2 THE COURT: Mr. Pichardo, I thought that the breach
3 letter was dated August 3, 2009, not in July.

4 MR. PICHARDO: No, Your Honor. I sent you a copy,
5 document number 11, as I numerated it from 1 to 80. And it's
6 dated July 10th, which they sent to me a foreclosure -- default
7 and foreclosure.

8 THE COURT: Okay, go ahead.

9 MR. PICHARDO: And I said to them -- that's when my
10 call was made to them. I said why are you sending me a default
11 and foreclosure initiation when I have -- when I had been up to
12 date on every payment? There has never been any kind of
13 rectification, cure, or anything to that effect. So all they
14 said was, oh, we received it -- we received the payment. But
15 nothing addressing -- nobody every addressed the default and
16 foreclosure in any way.

17 THE COURT: All right.

18 MR. PICHARDO: So here I am --

19 THE COURT: Mr. Pichardo --

20 MR. PICHARDO: -- in the hospital --

21 THE COURT: -- the servicing notes show a phone call
22 with you on August 7th, 2009. They -- what I thought was that
23 they sent you an August 3 default letter, and that you called
24 on August 7th.

25 MR. PICHARDO: No, Your Honor. I called prior to

1 August --

2 THE COURT: Okay.

3 MR. PICHARDO: -- also --

4 THE COURT: All right.

5 MR. PICHARDO: -- which concerned the document I just
6 mentioned to you dated July 10th of '09.

7 THE COURT: Okay.

8 MR. PICHARDO: Enumerated number 11 in my document
9 submission.

10 THE COURT: Okay. All right, go ahead.

11 MR. PICHARDO: And so here I am with this exacerbated
12 condition by all of this, and from the hospital I called them.
13 I said what is going on? Why have you done this? Why have you
14 not corrected this? I have no notification that you've
15 corrected this default -- false default, unjustifiable
16 reference for foreclosure. What is going on? So that was the
17 end of the conversation.

18 There was never, never, Your Honor, a conversation
19 concerning anything other than the payments I made in the
20 default.

21 THE COURT: Okay.

22 MR. PICHARDO: So I come out the hospital. When I
23 arrive, they're calling me, telling me, oh, you are going to
24 have to sign another agreement. I said why? I have an
25 agreement which was executed. It was finalized. It has terms

1 that there's no other agreements to that; that this is the
2 entire agreement. And I -- you have executed it and so did I.
3 And they go, no, you have to; if not, we're going to foreclose
4 on you.

5 And I said, again, so here I go again to the hospital,
6 Your Honor, with my condition. I had never been hospitalized
7 like this except when GMAC and the servicer started all this.
8 And here I am in the hospital. My wife brings over to me an
9 overnighted letter from them with a document. And I said, the
10 prior one took eight months, and they're telling me overnight
11 this. And I said I haven't even reviewed this. Hope in the
12 Treasury Department and Senator Feinstein's office was
13 instrumental in obtaining the first operative agreement, which
14 is the operative agreement, period.

15 And there's no notification saying we're going to send
16 you another agreement. We want you to look it over and if you
17 agree, sign it. No. They send it over with the threat of
18 foreclosure, which was still standing from their notifications.
19 And I go, I don't need another contract. I already have a
20 contract and it's binding. You have signed it. And I
21 submitted, Your Honor, also a document numerated for your --
22 for you to see that I requested the statement showing the
23 principal reduction, showing the interest and all the letters
24 pertaining to this modification.

25 For a year-and-a-half, Your Honor, I received those

1 statements, which I submitted to you -- to this Court. I
2 submitted those statements for a year-and-a-half that showed
3 that is the principal reduction on there. And three years
4 after, when I'm filing a complaint with the Financial
5 Protection Bureau -- Consumer Financial Protection Bureau --
6 three years after, they send a note saying, oh, there was an
7 error. By the way, there was an error. And I said, wait a
8 minute, an error? I have relied on the contract. I have
9 relied on the statements for a year-and-a-half. I have even
10 additional other documents which I submitted which shows from
11 the CEO -- GMAC's CEO -- stating that the principal amount on
12 the loan is exactly as per the operative agreement of this 5th
13 of '09.

14 And I put in the file all those documents that show
15 that they were admitting to that. Not only that, but all my
16 payments had been made to that first agreement and they have
17 accepted it. The issue that they want to imply that they're --
18 they want to introduce another agreement, Your Honor, that took
19 me another joke, and that's what got the condition that I have.

20 THE COURT: Okay. Let me ask you and then I want to
21 ask about something else. I think -- and I'm not ruling from
22 the bench. I understand the issues, and I'll go ahead and deal
23 with it in writing. You have your lawsuit against Ocwen,
24 correct?

25 MR. PICHARDO: Yes.

1 THE COURT: What's the -- has a trial date been set?

2 MR. PICHARDO: Not yet, Your Honor. There -- the
3 issue with Ocwen is that when they obtained this loan, they --
4 as you remember -- they were a participant in acquiring this
5 loan from the previous servicer. And I sent them notices
6 saying there are issues that you must address. For two years
7 they didn't touch anything. They didn't want to answer,
8 nothing. When finally I filed, and included Ocwen as the
9 servicer with the duty to perform on this contract, they
10 entirely washed their hands of it.

11 THE COURT: Yeah, no, I just want -- I'm just trying
12 to understand procedurally, because I know there was a hearing
13 on ADR, I think, on June 1st of 2015.

14 MR. PICHARDO: Yeah, there was no results of that,
15 Your Honor. I'm sorry.

16 THE COURT: Okay. And so what I'm trying --

17 MR. PICHARDO: They -- they --

18 THE COURT: I'm trying to find out whether this case
19 is going to go to trial in California or not and when.

20 MR. PICHARDO: It's probably will, Your Honor. The
21 judge had previously set for trial, but Ocwen requested ADR.
22 And I said, if you're not going to go by the operative
23 agreement, this is a waste of time. So eight months went by --
24 seven, eight months went by. And now they are requesting
25 summary judgment.

1 THE COURT: Ms. Richards, do you know what the status
2 is?

3 MS. RICHARDS: I -- Your Honor, I think the better
4 person to ask --

5 MR. PICHARDO: There's a hearing coming up --

6 MS. RICHARDS: -- is Mr. Shaham who's on the line.

7 MR. PICHARDO: -- September 9th for the summary
8 judgment, Your Honor.

9 THE COURT: I'm sorry, when?

10 MR. PICHARDO: September 8th, I'm sorry. September
11 8th. That's for a summary judgment.

12 THE COURT: And Ocwen's counsel is on the phone? Is
13 that what you're saying?

14 MS. RICHARDS: Yes, Your Honor.

15 THE COURT: Can you just tell me your name again, sir?
16 For who?

17 MS. RICHARDS: Mr. Shaham was on the line.

18 THE COURT: Mr. Shaham, are you on the line?

19 MR. SHAHAM: Yes, Your Honor, I'm on the line. Yaron
20 Shaham on CourtCall for Ocwen Loan Servicing.

21 THE COURT: All right. Tell -- what's the --

22 MR. SHAHAM: Thank you for allowing me to --

23 THE COURT: -- what's the status?

24 MR. SHAHAM: The status is, Your Honor, that there is
25 a second amended complaint before the Orange County Superior

1 Court here in Orange County, California. We have filed a
2 motion for summary judgment that is set currently for September
3 8th of this year. Recently Mr. Pichardo filed a motion for
4 leave to file a third amended complaint and add additional
5 causes of action. That motion was denied by the court, and as
6 such, the only thing that is currently on calendar before the
7 court here in Orange County, California is our -- is Ocwen's
8 September 8th MSJ hearing.

9 THE COURT: Okay, is that fully briefed yet?

10 MR. SHAHAM: We have filed our motion and supporting
11 pleadings. Mr. Pichardo has filed a response to our separate
12 statement of undisputed facts; and as such, that is currently
13 all that has been briefed at the present time. The way it
14 works here in California, Your Honor, is fourteen days prior to
15 a hearing on a motion for summary judgment, opposition
16 pleadings are due; and then about -- I think it's five days --
17 yeah, five days, Your Honor, the reply papers are all due. So
18 we still have a couple of weeks before everything has to get
19 in, Your Honor.

20 THE COURT: Okay. Thank you very much.

21 MR. SHAHAM: You're welcome, Your Honor.

22 THE COURT: All right. I'm going to take the matter
23 under submission. I have a, I think, a pretty complete
24 understanding of the legal issues on the objection to the
25 claim, and I will enter an appropriate decision. Okay?

1 MS. RICHARDS: Thank you, Your Honor.

2 THE COURT: Thank you very much, Mr. Pichardo.

3 MR. PICHARDO: Thank you, Your Honor.

4 THE COURT: All right. We're going to take a --

5 MR. WISHNEW: Your Honor, there's one last matter.

6 THE COURT: Go ahead, Mr. Wishnew.

7 MR. WISHNEW: Briefly, Your Honor. The last matter on
8 today's calendar was a second status conference. This is at
9 number 1 under V on page 8 of today's agenda. This concerns
10 the claim objection of the Borrower Claims Trust to Erlinda
11 Abibas Aniel and Fermin Solis Aniel. I believe Ms. Aniel is on
12 the phone.

13 THE COURT: Ms. Aniel, are you on the phone? Ms.
14 Aniel, are you on the phone? I see you've checked in earlier.

15 MS. ANIEL: Yes, good morning, Your Honor.

16 THE COURT: Thank you.

17 MS. ANIEL: Yeah, I'm here.

18 THE COURT: Okay, go ahead, Mr. Wishnew.

19 MR. WISHNEW: Your Honor, unfortunately, since Your
20 Honor issued the decision on June 30th, the Borrower Trust has
21 not had an opportunity to reach out to Ms. Aniel to try and
22 explore settlement. However, in the interim, Ms. Aniel did
23 file a motion for reconsideration that I know the Court has at
24 this point in time. We're willing to wait for the Court to
25 rule on the reconsideration motion and then try and briefly

1 explore settlement, and if not, then move forward towards an
2 evidentiary hearing on any --

3 THE COURT: All right. You shouldn't be waiting for
4 me to rule on the motion for reconsideration.

5 MR. WISHNEW: Okay.

6 THE COURT: You should reach out and --

7 MR. WISHNEW: Okay.

8 THE COURT: -- certainly begin discussion with Ms.
9 Aniel to see whether you can -- the matter can be resolved or
10 not.

11 MR. WISHNEW: Okay.

12 THE COURT: In due course, I'll rule on the motion for
13 reconsideration, but I don't have a ruling yet.

14 MR. WISHNEW: Okay.

15 THE COURT: So let's not wait.

16 MR. WISHNEW: Very good.

17 THE COURT: Ms. Aniel, is there anything you want to
18 say?

19 MS. ANIEL: Pardon me, Your Honor?

20 THE COURT: Yes? So Mr. Wishnew or one of his
21 colleagues will be in touch with you to try and discuss whether
22 the matter can be resolved through settlement. You have your
23 motion for reconsideration. In due course, I'll rule on that.
24 If not, I'm going to expect that the scheduling order gets
25 set --

1 MR. WISHNEW: Yup.

2 THE COURT: -- and we'll deal with that.

3 MR. WISHNEW: Will do, Your Honor.

4 THE COURT: So you want to likewise speak with Ms.

5 Aniel about -- assuming you can't get it resolved -- about a
6 scheduling order as well --

7 MR. WISHNEW: Yes.

8 THE COURT: -- with the appropriate schedule list.

9 MR. WISHNEW: Yes.

10 THE COURT: Okay?

11 MR. WISHNEW: Very good.

12 THE COURT: All right. Thank you very much, Ms.

13 Aniel.

14 MS. ANIEL: Okay, thank you very much, Your Honor.

15 Have a nice day, thank you, bye-bye.

16 THE COURT: All right. We're going to take a ten-
17 minute recess, and then we'll hopefully finish up reasonably
18 quickly. Okay?

19 MR. WISHNEW: Very good, Your Honor.

20 THE COURT: Thanks very much.

21 MR. WISHNEW: Thank you.

22 (Whereupon these proceedings were concluded at 11:07 AM)

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

RULINGS

	PAGE	LINE
Proposed case management and scheduling	6	24
order in Longoni and Gagnon claim matter is		
approved.		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: July 17, 2015